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Supreme Court, U.S.
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In The
Supreme Court of the United States

HERMANN GEIER, Survivor of
November 11, 2000 Kaprun Fire, *et al.*,

Petitioners,

v.

OMNIGLOW CORPORATION, *et al.*,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit**

REPLY BRIEF

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REPLY BRIEF

Petitioners belonged to a Class Certified by U.S.D.J. Scheindlin, SDNY.[1] Class members were Americans and non-Americans who lost relatives in History's worst train catastrophe (155 of 167 died). Respondents appealed Class Certification of an "opt-in" class; the Class was decertified.[2,3] Consolidated MDL[4] cases continued, however, American plaintiffs received settlements from Respondents, non-Americans were then left to oppose forum non conveniens,[5] which was decided six years after MDL litigation commenced.[6] "Foreigners," as Respondents, refer to Petitioners, represented >95% of the decertified class. Respondents' assertion Austria was an adequate alternative forum was simply untrue. Respondents asserted statutes of limitations would not expire, but they would not waive the defense, if they did. Respondents also knew and counted on the following:

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[1] *In re Ski Train Fire in Kaprun, Austria on November 11, 2000*, 220 F.R.D. 195 (SDNY 2003).

[2] *Kern v. Siemens Corp.*, 393 F.3d 120 (2nd Cir. 2004).

[3] *Certiorari denied by Kern v. Siemens Corp.*, 544 U.S. 1034 (2005).

[4] *In re Ski Train Fire in Kaprun, Austria on November 11, 2000*, 175 F.Supp.2d 1379 (Jud.Pan.Mult.Lit.,2001).

[5] *In re Ski Train Fire in Kaprun, Austria on November 11, 2000*, 499 F.Supp.2d 437 (SDNY 2007).

[6] Id.

Austrian cases combined corruption, concealment and cover-up, which was elucidated after forum non conveniens was won by Respondents who "cherry-picked" whom they would settle with, in the fair forum of U.S. courts, participated in collusion, corruption, concealment in Austria, and now come before this Court complaining Petitioners are Foreigners, who have lost in every other forum before this one, that is why their Petition should not be granted Certiorari. Petitioners would not be "foreigners," had Respondents not unfairly settled with only American plaintiffs, instead of settling with all plaintiffs in what was, previously, a Certified Class.

Cover-up and concealment in Austria, came from two sources.[7] The Commission selected by the Transportation Ministry to investigate if the fire was foreseeable and if GBK's[8] conduct met prevailing standards, comprised 10 individuals, five of whom were major witnesses and who by positions and affiliations were investigating their own misconduct (one expert was indicted for liability in the fire). Only one independent expert was without conflict in rendering an accurate opinion. The concealment was so

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[7] Our Reply Brief summarizes the recent uncovering of the ten year cover-up. All assertions will be fully supported in the Merits Brief Appendices should Petitioners have the opportunity to present their case before this Court.

[8] The acronym for the funicular cable railway, operated to transport skiers, to the Glacier at Kaprun. It was sleek, beautiful and touted as ultra-safe, an exemplary state of the art carrier, now proven to be a catastrophe that was ordained to occur given the design, construction, operation and maintenance of the train which was concealed for a decade.

great, the names of two panel members, one under indictment (the Minister of Transportation, mandated to oversee Railways), were only in the original French version of the final report; they were stricken from the German version used in Austrian proceedings. It is now known the Commission report was totally, wilfully fabricated and perjured to protect members, industry image, and cozy relationships between industry and regulators. An independent, honest, accurate Expert Opinion was discounted by the Austrian court, by questioning the health of the expert during his opinion preparation (at which time he was incessantly harassed and pressured by Defendants).

Another corrupting influence was bias of Judge Seiss who presided over the Criminal cases in Salzburg Austria, where a total of 34 investigations led to 16 indictments; resulting in 16 acquittals. The Judge was later found to serve in a fraternal organization with Board members of GBK, bank and utility closest to and including Defendants and Regulators being prosecuted.[9]

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[9] In Austria, tort complainants typically intervene in criminal cases where their claims may result in damages. Civil tort trials which follow, may augment the damage, if there has been a conviction, but are virtually impossible to win, absent a conviction on criminal charges. Unlike the U.S. where claimants' civil case(s) are tolled once filed and then Stayed during criminal prosecution, civil tort cases in Austria are not tolled once filed and are only Stayed by consent. This would allow the statute of limitations to run, while prosecutors or judges intentionally delayed concluding criminal proceedings preventing

(Continued on following page)

These corrupting impediments to prosecutions in the Kaprun disaster came from (1) O.I.T.A.F., "International Organization of Cable Transport Operators," whose then President headed the Ministry of Transportation responsible for railway safety oversight, indicted for liability in the tragedy, and on the Commission, but whose name appeared only on the French original report. All Commission members were active O.I.T.A.F. members; the experts chosen had varying expertise and lack thereof, but possessed undying devotion to protect the safety image of Cable Railway businesses, and (2) GBK affiliations in local government (a major shareholder) and interconnected board and advisory panel memberships, in impacted industries and financial institutions, where Judge Seiss mingled with many Defendants at Lions Club functions.

Technical Revelations

Contrary to pervasive user-manual and packaging information, a household room heater was used in train cars and modified by GBK's electrician to fit the console of the conductor's compartment and operate from its control panel. Immediately after the accident, "Central Criminal Technical" investigators arrived and found hydraulic oil covered wood components and insulation material, evidence of major

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civil tort cases from proceeding, which is what happened in the Seiss court in Salzburg.

hydraulic leaks. Their photographs remained in the evidence room at the Salzburg court for a decade. However, the "Expert Commission" never investigated the heater as it was beyond the scope of their mandate and they concluded any oil was a subsequent contaminant.

Further, the hydraulic systems specified hydraulic fluid needed for trains and land vehicles. Instead the fluid used was for aircraft, operated at different temperatures. Colder temperatures in the mountain tunnel required a different hydraulic fluid. The incompatible fluid used caused system failure. Manometers measuring hydraulic pressure clearly specified the correct hydraulic fluid composition; but it was not used; manometers also specified allowable operating temperature. Operation above -20° C (-4° F) was required, however the train regularly operated at -30° C (-22° F).

Austrian court Expert Wagner's testimony concealed the hydraulic system had been operated far beyond and in total violation of its specified ambient conditions with incompatible hydraulic fluid. Wagner further concealed that both manufacturers' and suppliers' instructions prohibited the hydraulic system and components from being used "in deviant working and ambient conditions" and that fire and explosion protection was necessary. Material Safety Data Sheets ("MSDS") warned of fire and explosion hazards: "PHYSICO-CHEMICAL HAZARD. The fluid can set off vapors which can form highly inflammable alloys. When ignited, accumulation of vapors may

blow out or explode. The fluid may accumulate static charges which may cause ignition." MSDS included firefighting instructions: "Evacuate the area . . . firefighters must be equipped with . . . heavy respiration protection gear in closed rooms." MSDS warned of unusual fire hazards: "INFLAMMABLE. Compressed mist may form an inflammable mixture." MSDS warned "dangerous combustion products: smoke, vapor, aldehydes, sulphur oxides, phosphorous oxides, products of incomplete combustion, carbon oxides" All were concealed and covered up by the Austrian Expert Commission, particularly that the hydraulic fluid "AERO HFA" had been used in violation of MSDS, because it had been used:

1. Beyond specified use parameters;

2. Without expert approval for any deviation;

3. Without adequate ventilation;

4. Near a redesigned household fan heater;

5. In a closed building (tunnel) – with exits thousands of meters away;

6. Not for industrial purposes, but in vehicles for public transport;

7. By ignoring all warnings noted in the labeling and MSDS;

8. Despite hazardousness without required fire and explosion protection.

Lax regulators never inspected just before the refurbished train went "live." Thus, adequate safety and evacuation instructions to passengers were absent. The only instructions posted, directed passengers to follow the guidance of the conductor on the loudspeaker system in event of emergency. However, when the electrical systems failed, so did loudspeakers.

Judicial Management

The one correct, insightful report was from Expert, Muhr. The Court discredited him by ruling he was ailing when he drafted the report; his findings were ignored. In fact, his were the only correct findings as to causes of the fire.

Therefore, based on a report submitted by the Commission and based on the expert testimony and opinion it solicited, now known to be perjured, the Court ruled danger of fire and explosion in the tunnel ski train cars were not foreseeable before the catastrophe and therefore, no fire and explosion reinforcement was required.

This decision ignored not only Local and International Law, but explicit ubiquitous warnings by manufacturers and suppliers of the hydraulic oil, the hydraulic instrumentation, and the household fan heater. Despite responsible suppliers and manufacturers, designating limits of their products and compatibility requirements with other components for safe operation, none of the concealed warnings and prohibitions were made public during the criminal

trial, albeit, available in MSDS, warnings on products themselves, on shipping cartons, in user-manuals.[10] Yet, no witness appointed by the Austrian court, as an expert, ever hinted, that all these protocol, safety, and regulatory compliance violations were occurring which rendered the GBK funicular car disaster at Kaprun absolutely predictable.

Expert witnesses had multiple conflicts of interest. The expert panel were all from O.I.T.A.F. O.I.T.A.F. exists to promote and protect ski industry transportation. Though O.I.T.A.F. exists globally,[11] its most influential members are Austrian, French and Swiss, viz. European Alps, where winter ski tourism comprises a greater proportion of the gross national product ("GNP") than elsewhere, and Austria has the greatest proportion of the GNP. O.I.T.A.F.'s most influential members, included Austrian regulatory officials responsible for overall oversight of funiculars, cable railway operators, and major industry entities who provided components and materials for ski-resort transportation systems, i.e., Respondents, herein.

Each expert appointed to the panel, served on multiple corporate and government advisory boards

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[10] User-manual warnings were duplicitously explained away by asserting they were for vehicles, a cable car is more like an inclined elevator.

[11] The U.S. is an active O.I.T.A.F. member; Congresses are rotated and have been held in San Francisco.

that intertwined O.I.T.A.F. chieftains, making them fiduciaries to several interdependent entities, requiring their silence concerning non-public information (but also requiring them to resign from the Expert Panel or advisory and management boards as soon as conflict was foreseen or realized, or be criminally liable under Austrian law).[12]

As to expertise, virtually all the experts already knew or learned in reviewing the disaster, that a total collapse of professional duty by GBK occurred, as well as total dereliction of duty by regulators who had become too trustingly familiar with the industry it

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[12] When these bad faith dual roles were discovered in late 2009 and 2010, criminal prosecutions were reopened, reviving hopes of Petitioners for justice and free access to information; but they were closed virtually as soon as they were opened, the Kaprun Commission (formed to adjust liability) had already demanded the acceptance, and remitted fraudulent, unconscionable "settlements-of-adhesion," carrying forward years of fraud, having threatened if the awards were not accepted there would be no future offers. Distributions to families of similarly situated victims were incomprehensibly disparate. Two families received nothing because they were told every family would be contacted; they were not required to take the initiative. When funds were distributed they received nothing and made claims but were told they were too late, they should have applied earlier. The egregious distribution of funds gave about 80,000 Euro (the largest awards) to estranged relatives of some victims while awarding 19,000 Euro total to cover care and support, to adulthood, of three very young siblings orphaned when both parents perished in the fire. Japanese victims' families learned of the concealment, cover-up and fraud only the day before distribution of the funds. They renunciated their agreements and returned the settlement checks.

was their mandate to oversee. Together there was synergistically depraved indifference to the safety of the GBK passengers who rode ski-trains to enjoy a beautiful day on the slopes.

Passengers aboard on November 11, 2000, including eight Americans, expected a magnificent day of skiing. Ninety-three percent were needlessly slaughtered by corporate greed to lower costs by a largely government owned (37% municipal; 45% state) railway cutting corners, choosing an inexpensive home heater, prohibited for use in a train or any other vehicle, gerry-modifying it, to fit inside a console, where it was never intended to be, in direct contact with an incompatible hydraulic system and fluid combination described in MSDS as volatile and explosive. These deaths were equally caused by regulatory complacency and complicity to depraved indifference, by officials mandated to provide fail-safe oversight preventing private greed from impairing public safety.[13] Private and public sectors in Austria acted in concert to ensure certainty of catastrophe which ensued.

Actions were filed in Austria and U.S. In hindsight, there was a seemingly concerted blindness on

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[13] Then, of course, these same top Transportation Ministry regulators were both O.I.T.A.F. members and on the "independent" Commission to investigate and report to the Austrian Courts the cause of the Kaprun Ski-Train fire disaster, along with the industry head they were supposed to be regulating, but apparently did not.

the part of Judge Seiss, who interpreted his role to protect Austrian Winter Ski Tourism being tantamount to defense of country in whose employ he served, not to mention the consequences that finding culpability would have had on the tour guide company he owns, where he personally trains guides, or at his Lions Club friends and associates. The Salzburg court, amidst ski-country, was allowed to handle the prosecutions. Perhaps deliberately, because Judge Seiss was associated with local luminaries of GBK, its various partners, investors, and friends.

Had proceedings been moved to Vienna where the ski industry is not as important, the Court might have resisted acting as if an interested party. In fact, when cover-up, concealment and erroneous conclusions of the Salzburg court came to light and received constant press, the Salzburg proceedings were moved to Linz, a more remote venue, with even more provincially accepted protective norms of alpine winter sport.

American victims' families and non-American survivors and victims' families filed suit in United States District Courts, which were consolidated by the MDL Judicial panel in SDNY.[14] Application for Class Certification as an "opt-in" class was approved.[15]

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[14] *In re Ski Train Fire in Kaprun, Austria on November 11, 2000*, 175 F.Supp.2d 1379 (Jud.Pan.Mult.Lit.,2001).

[15] *In re Ski Train Fire in Kaprun, Austria on November 11, 2000*, 220 F.R.D. 195 (SDNY 2003).

Defense appealed and the Second Circuit reversed, finding the Kaprun cases inappropriate for "opt-in" class certification.[16] This Court[17] denied Certiorari. Eight American families settled with Respondents without their former co-plaintiffs being included. Negotiations were unbeknownst to other co-plaintiffs, settlements kept secret. Remaining MDL co-plaintiffs felt betrayed, defrauded, disconsolate. Their claims were tolled in the U.S., but statutes of limitation would expire in Austria, and there was already suspicion, the Austrian Prosecutor and courts, were simply acquitting those charged with wrongdoing.

It took a decade to uncover these facts, because regulators allowed noncompliance or did not bother to monitor the GBK refurbishment project.

A "mock-up" of the train refurbishment was inspected during construction; regulators never returned for another inspection.

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[16] *Kern v. Siemens Corp.*, 393 F.3d 120 (2nd Cir. 2004).

[17] *Certiorari denied by Kern v. Siemens Corp.*, 544 U.S. 1034 (2005).

Recent History of Austrian Proceedings

9/25/2007: Heilbron report exposing perjury of experts is issued[18]

9/26/2007: Salzburg announces reopening cases including against four experts; Prader, Geishofer, Wagner, Maurer.

11/6/2007: Final Kaprun Commission meeting pressuring victims into settlements-of-adhesion.

11/7/2007: Justice Ministry recloses criminal cases.

11/2007: Criminal cases against the four experts are dismissed.

4/18/2008: Keim and Schrettenbrunner[19] file criminal complaints in Austria based on technical data.

4/30/2008: Last day to accept Kaprun Commission settlements-of-adhesion.

6/18/2008: Commission "settlement" becomes final; funds distributed.

2/1/2009: Venue moved from Salzburg to Linz

6/2009: Linz prosecutor reindicts only the four experts.

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[18] Austrian proceedings declared flaws in the German-made heater was responsible. Inquiry made in Heilbron, Germany was the first to identify concealment and cover-up three months after the forum non conveniens dismissal.

[19] Two German experts whose findings are now widely accepted and who have subsequently agreed to testify for Petitioners.

12/23/2009: Linz prosecutors issue statement validating Salzburg proceedings.

3/2010: Statutes of limitations expired on all claims in Austria; Respondents reserve all defenses.

6/14/2010: Final decision in criminal cases; only Appeal to European Court for Human Rights (which has no enforcement powers in Austria) remains. Appeals are exhausted in Austria. No one was ever convicted in Austria.

Because of these events, Petitioners rights are now limited to U.S. courts which took jurisdiction over the combined claims of Foreigners and Americans eight years ago.[20] While Austrian criminal cases proceeded in parallel to U.S. civil actions, Austria has proven it is not an adequate forum, it never was an adequate forum, and it never can be an adequate forum as enumerated herein.

Once Respondents won decertification and isolated the few Americans from a cohesive class, the next maneuver was to move for forum non conveniens and remove Petitioners from access to U.S. courts, deceitfully alleging that Austria represented an adequate alternate forum when the cover-up was still believed.

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[20] *In re Ski Train Fire in Kaprun, Austria on November 11, 2000*, 175 F.Supp.2d 1379 (Jud.Pan.Mult.Lit.,2001).

CONCLUSION

Though Petitioners deserve the same damages Americans achieved, that is irrelevant. Petitioners need closure, they need an honest forum to bring out true facts, and expose why loved ones died. Petitioners need to hear in court and read in a decision whatever deterrence exposure can bring. Respondents oppose this. If Respondents' opposition prevails, wrongdoing of Respondents is rewarded rather than adjudicated. Petitioners should be heard by this Court not only for their peace, but so all people can board common carriers everywhere with greater safety and compliance that full airing of these facts will bring.

Respectfully submitted,

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